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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. DOROTHY LATISHA JACKSON, Defendant and Respondent.	E065894 (Super.Ct.No. RIF1309977) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from an order of the superior court granting defendant and respondent Dorothy Latisha Jackson's petition (Pen. Code, § 1170.18)[1] to reduce her felony conviction for second degree burglary (§ 459) to a misdemeanor under the Safe Neighborhoods and Schools Act (Proposition 47). (§ 1170.18.) On appeal, the People argue: (1) defendant did not meet her burden of establishing eligibility for the redesignation of the offense to a misdemeanor under Proposition 47; (2) defendant was not eligible to petition for redesignation of the offense to a misdemeanor under Proposition 47 because she remained guilty of second degree burglary even after the passage of Proposition 47; (3) defendant's conduct of entering a bank with the intent to commit felony identity theft does not meet the statutory definition of misdemeanor "shoplifting" under section 459.5, a crime added by Proposition 47; and (4) defendant did not enter a "commercial establishment" within the meaning of section 459.5. We reject these contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

On August 30, 2013, defendant entered a U.S. Bank in Moreno Valley, California and attempted to cash a check in the amount of $444 in the name of William Goodwin. The bank teller noticed the check was suspicious and contacted Goodwin. Goodwin reported that he did not write a check to defendant.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the incident report.

By felony complaint filed on September 5, 2013, defendant was charged with one count of felony second degree burglary (§ 459; count 1) and one count of felony forgery (§ 475, subd. (c); count 2). Specifically, count 1 stated that defendant entered "a certain building . . . with [the] intent to commit theft and a felony."

On September 18, 2013, pursuant to a plea agreement, defendant pleaded guilty to count 1. In return, the remaining allegation was dismissed, and defendant was sentenced to a split term of four months in county jail and 12 months of mandatory supervision on various terms and conditions.

On August 3, 2015, defendant filed a petition to have her felony second degree burglary conviction designated a misdemeanor pursuant to section 1170.18.

On September 24, 2015, the People opposed the petition on the ground that defendant's crime was not eligible for redesignation. The People argued that defendant was not convicted of shoplifting because her intent was to commit identity theft pursuant to section 530.5; and that she did not enter a "commercial establishment" within the meaning of section 459.5. Following a hearing, on February 26, 2016, the trial court granted defendant's petition and redesignated her felony second degree burglary conviction a misdemeanor pursuant to section 459.5.

The People filed a timely appeal.

II

DISCUSSION

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, sections 1170.18 and 459.5. (*Rivera*, at p. 1091.) Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. (*Rivera*, at pp. 1092-1093.)

Section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." And, subdivision (g) provides that "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Penal Code section 459.5 was among the provisions added by Proposition 47. It reduces certain second degree burglaries to misdemeanors by defining them as "shoplifting," that is, "entering a commercial establishment with [the] intent to commit

larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).” (§ 459.5, subd. (a).)

In this case, the trial court granted defendant’s petition to reduce her felony second degree burglary conviction of entering the U.S. Bank with the intent to cash a forged check in the amount of $444. The People now appeal, asserting defendant failed to establish eligibility, defendant’s conduct of entering the bank was to commit felony identity theft and not shoplifting, and defendant did not enter a “commercial establishment” within the meaning of section 459.5.

We review a trial court’s “legal conclusions de novo and its findings of fact for substantial evidence.” (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) “In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) “ ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]’ ” (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) “In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the

evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

A. *Petitioner's Burden*

The People contend the trial court erred in granting the petition because defendant "failed to present any evidence regarding the underlying facts of her section 459 conviction," and merely "filed a stock resentencing form and checked the box for 'Defendant believes the value of the check or property does not exceed $950.' " In effect, the People contend the trial court was not permitted to reach the merits of defendant's petition without first finding defendant had made a prima facie case of entitlement to resentencing. We find no error.

First, the People fail to set forth what constitutes a prima facie case or how defendant's petition was defective. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) We decline to do so here.

Even assuming the People's argument is that defendant failed to show she attempted to cash a forged check for an amount that did not exceed $950, we refuse to reverse on that basis. Defendant signed a petition declaring, under penalty of perjury, that "the value of the check" she was convicted of passing "does not exceed $950." The People rely on this court's opinion in *People v. Perkins* (2016) 244 Cal.App.4th 129 (*Perkins*) to support their position.

A trial court need not consider the merits of a Proposition 47 petition unless the petitioner has made a prima facie showing of eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875; *Perkins*, *supra*, 244 Cal.App.4th 129.) In *Perkins*, this court held that to satisfy this initial burden, the petitioner must attach to his petition "some evidence" of eligibility. (*Perkins*, *supra*, at p. 137.) Here, defendant filed a petition alleging the amount of loss did not exceed $950. The petition took the form of a declaration under penalty of perjury that appears to be signed by defendant's attorney. The People did not contest this assertion in their responsive pleading in the trial court. Nor did they in any way address the sufficiency of the petition. In fact, the People attached defendant's arrest report, which shows the value of the forged check as $444, to their opposition to defendant's petition. Moreover, at the hearing on the petition, the People expressly conceded that the value of the forged check was $444.

It is a basic, well-settled principle that a party's duty to set out a prima facie case may be discharged by the opposing party's concession. As our high court long ago explained, "when the [party who carries the burden] has proved *or the* [*opposing party*] *has conceded*" an element of a claim "a *prima facie* case . . . is thereby made, which discharges *the burden of proof*." (*Graham v. Larimer* (1890) 83 Cal. 173, 177-178, italics added; accord, *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123 [the opposing party's "concession established the facts necessary to support a prima facie claim of privilege . . . and passed the burden to [the party opposing privilege]"].) The function of pleadings is to aid the court in determining which factual

issues are in dispute. (*People v. Duvall* (1995) 9 Cal.4th 464, 480 [habeas pleadings "fulfill [the] function of narrowing the facts and issues to those that are truly in dispute"].) "The initial screening of the petition for resentencing is similar to the initial screening of a petition for writ of habeas corpus. California Rules of Court, [r]ule 4.551(f) provides that '[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' " (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (May 2016 rev. ed.) p. 39, at <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of Dec. 6, 2016].)

The pleadings in this case, taken together, conveyed to the trial court there were no disputed material facts regarding defendant's eligibility. The petition declared the amount of loss did not exceed $950, and the People agreed the value of the stolen or forged check was $444. The People's concession to defendant's petition discharged the prima facie burden thereby requiring consideration of her petition on the merits. Accordingly, under these circumstances, we cannot find the trial court abused its discretion by reaching the merits of defendant's petition.

B. *Identity Theft*

The People contend that defendant was not eligible for resentencing because she entered the bank with the intent to commit felony identity theft (§ 530.5), an offense not subject to Proposition 47.

The complaint charged that on August 30, 2013, defendant "wilfully and unlawfully enter[ed] a certain building . . . with intent to commit theft and a felony" in violation of section 459 (count 1). In count 2, defendant was charged with possessing a completed check "with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud . . . ." (§ 475, subd. (c)). Both of the crimes are interrelated in that defendant entered the bank and attempted to cash a stolen or forged check in the amount of $444. The complaint did not charge identity theft. Defendant entered a plea to count 1, burglary. Identity theft simply was not placed in issue at the time of the plea.

In *People v. Abarca* (2016) 2 Cal.App.5th 475, 483-484 (*Abarca*),[3] review granted Oct. 19, 2016, S237106, we relied on the convicted offenses, not offenses that could have been filed but were not, such as identity theft. We noted that Proposition 47 provided a petitioning procedure by which an offender could seek resentencing on felony convictions that qualified under Proposition 47. Defendant here was not convicted of identity theft. We will not look behind defendant's actual convictions to find an uncharged crime that would make her ineligible. (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1427-1428; *People v. Maestas* (2006) 143 Cal.App.4th 247.)

The trial court's determination that defendant was entitled to redesignation of her second degree burglary conviction to a misdemeanor was based on the implicit finding that her conviction was predicated on her intent to commit theft or forgery. On review, we indulge in every presumption to uphold the judgment and look to the appellant to

[3] California Rules of Court, rules 8.1105 and 8.1115.

show error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) For the reasons stated in *Abarca, supra,* 2 Cal.App.5th 475, we reject the People's contention that defendant is ineligible for resentencing.[4]

C. *Commercial Establishment*

The People also contend that defendant is not entitled to resentencing because a bank is not a "commercial establishment" within the meaning of section 459.5. That term is not defined in the Penal Code, and the People urge us to adopt a commonsense meaning, which would be its plain, ordinary meaning. The People contend that the voters intended to limit shoplifting to theft crimes of establishments which have goods on display.

In *Abarca, supra,* 2 Cal.App.5th at pages 481-482, we rejected the same argument, noting that the term "commerce" is normally defined as the exchange of goods and services, and the term "establishment" is defined as a place of business. We explained: "Banks satisfy this definition. Bank customers use banks to deposit and withdraw funds in exchange for fees. In the context of approving banks' ability to collect fees from non-depositors who use their automatic teller machines, the U.S. Court of Appeals for the Ninth Circuit noted '[t]he depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.' (*Bank of America v. City & County of San Francisco* (9th Cir.

[4] We note that the meaning of larceny as used in section 459.5 is on review by the California Supreme Court. (*People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171.)

2002) 309 F.3d 551, 563.) Thus, a business like U.S. Bank provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary meaning of that term." (*Abarca, supra*, 2 Cal.App.5th at pp. 481-482.) A bank, therefore, is a financial services business. We follow our precedent in *Abarca*, and again reject the People's argument. (*Ibid*.)

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

I concur:

CODRINGTON
J.

MILLER, J., Concurring.

I write this concurrence only to clarify that I agree the concession in this case by the People as to the value of the check was based on the prosecutor's oral admission in court to the value of the check. To the extent the majority opinion could be interpreted to allow the People to concede the issue of value, or any other matter, in a form response by failing to dispute the issue, such silence would not alleviate the trial court of its burden of finding a prima facie evidentiary showing of eligibility under Proposition 47.

Defendant had to make an initial prima facie evidentiary showing that his felony conviction of burglary constituted misdemeanor shoplifting because the value of the property was less than $950 and that he entered a commercial establishment to commit larceny. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 ["It is a rational allocation of burdens if the petitioner in such cases bears the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence"]; see also *People v. Bush* (2016) 245 Cal.App.4th 992, 1007-1008.) Defendant attached no evidence to the petition, by either a declaration or documents, establishing the true value of the property or whether the building he entered was a commercial establishment. However, the form was signed under penalty of perjury and defendant attested the value of the check was less than $950. The People filed a form response and attached a police report detailing the crime. The trial court, within its discretion, determined a hearing was necessary.

Penal Code section 1170.18 provides that once the court receives a petition, "the court *shall* determine whether the defendant" would have been guilty of a misdemeanor. (Italics added.) Penal Code section 1170.18 does not require the People file a response or contest the petition. Moreover, the trial court did not have to accept any concession in the response form by the People as it had an affirmative duty to determine defendant's eligibility.

At the hearing on the petition, the prosecutor, representing the People, stated the value of the check was $444. The People attested on the record that based on their knowledge of defendant's conviction, the value of the check was less than $950. These representations on the record, along with the proper finding that identity theft was not charged and the bank was a commercial establishment, support the trial court's conclusion that defendant's conviction qualified under Proposition 47. I concur in the result reached in the majority opinion that the trial court properly granted the petition.

MILLER

J.